Supreme Court Cause No. DA 09-0500

IN THE SUPREME COURT OF THE STATE OF MONTANA

LON PETERSON,
Appellant/Cross-Appellee,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Appellee/Cross-Appellant,

APPELLEE/CROSS-APPELLANT, ST. PAUL FIRE & MARINE INSURANCE COMPANY'S REPLY BRIEF TO APPELLANT'S RESPONSE TO CROSS-APPEAL

On Appeal from the Montana Eighth Judicial District Court, Cascade County

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FACTS REGARDING COSS-APPELLANT'S ISSUES FOR REVIEW:

The facts surrounding the issues of negligence and liability for the Peterson/Lindberg accident were contested and legitimately disputed, from the outset of St. Paul's initial investigation, up through the time when the contested liability case eventually settled upon Peterson's request that a standing $850,000.00 settlement offer be proposed to him in the form of an offer of judgment. (TR2: 429, 445, 482; TR4: 857, 882-885; 917; D's Ex. 559.7-559.8).

I. LINDBERG'S ROAD POSITION:

Throughout the initial investigation of the liability claim and right on through the bad faith trial, Mike Lindberg has always denied Peterson's assertion that he caused the accident in question. (TR4: 826,829; D's Ex. 508.7, 508.10). During St. Paul's investigation of the accident, Lindberg explained to Richard Allums, that prior to cresting the hill where the accident occurred, he had driven his pickup truck as far over to the right shoulder as he could go. (TR2:467). Lindberg told St. Paul that he believed Peterson was driving in the middle of the road and that Peterson caused the accident. (D's Ex. 501.59; 508.10). Lindberg's belief was corroborated by the expert analysis of Dr. Lee, whose analysis and reconstruction of the accident scene placed Peterson nearly two feet over the

midpoint of the road. (D's Ex. 501.45[1] TR2: 474; D's Ex. 559.05-559.10). Dr. Lee's conclusion was that the accident was solely caused by Peterson's failure to move to the north shoulder of the road as he crested the hill:

> *It is my opinion that neither driver was driving at a reckless speed in this accident. There was clearly enough room for both vehicles to pass one another on this hill. It is my opinion that the sole cause of the accident was Mr. Peterson's failure to move to the north and thus be completely in the westbound lane as he approached the crest of the hill. Had he done so, there would have been no accident. (D's Ex. 559.8-559.9[2]).*

Dr. Lee's liability opinions[3] went un-rebutted by Peterson until November 15, 2006 (reported to St. Paul 12/1/06[4]). Allums made several requests to Peterson's counsel for any additional information Peterson wanted St. Paul to consider and/or any disputes Peterson had regarding Dr. Lee's conclusions. (D's Ex. 501.48, claim note 11/18/04; 501.46, claim note 4/11/05). Six months after requesting additional facts from Peterson's counsel, and after hearing nothing, Allums recommended that the Peterson file be closed. (D's Ex. 501.45).

During the bad faith trial, Peterson acknowledged the existence of a legitimate factual dispute between him and Lindberg regarding Lindberg's position

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[1] Richard Allums' claim note, 7/11/2005.

[2] Gregoire's 12/15/06 Disclosure of Dr. Lee's expert opinions.

[3] First reported to St. Paul on November 18, 2004 (D's Ex. 501.48); Later reported to St. Paul by Mr. Gregoire on September 20, 2005 (D's Ex. 501.41).

[4] See, D's Ex. 501.17-501.19 (Gregoire's Dec. 1, 2006 status report).

on the roadway at the time of the accident:

> ***Q. Do you know of any point where Mike Lindberg has ever said he was anywhere on that road but as far over as he could be to the right?***
>
> *A. As far as the location, no, I don't...*
>
> ***Q. But -- excuse me. I didn't mean to cut you off. You haven't heard of him saying anything but that he was on his side of the road, correct?***
>
> *A. Correct...*
>
> ***Q. Do you dispute his belief?***
>
> *A. Oh, yes.*
>
> ***Q. And he disputes your belief? You guys don't agree?***
>
> *A. Well -- I guess you could put it that way, if he was way on his side and I was on my side, then nobody would have touched. (TR4: 754).*

St. Paul moved for summary judgment, based in part, upon the very factual dispute Peterson acknowledged in his trial testimony. (CR 11, pp. 1-7; CR57, pp. 4-10). The material factual dispute acknowledged by Peterson during his trial testimony was first placed before the trial court on October 22, 2007. (CR 11).

II. ALLEGED CELL PHONE USE:

In addition to the dispute regarding road position, the issue of Lindberg's alleged cell phone use was also contested from the very onset of St. Paul's

investigation. (D's Ex. 501.59[5]). In the underlying liability case and in the bad faith trial, Peterson alleged that Lindberg was reaching for a ringing cell phone at the time of the accident. (TR1: 196). The only evidence Peterson has ever presented in support of his allegations of cell phone use is the investigation report of Officer Sons. (P's Ex. 1). In contrast to the information contained in Officer Son's report, Lindberg has consistently denied that he was reaching for and/or that he was distracted by a ringing cell phone at the time of the accident. (TR2:434, 456-457; D's Ex. 501.59). Lindberg told St. Paul that his cell phone never rang:

RA: Ok, so your cell phone wasn't ringing?

ML: Nope.

RA: And you weren't reaching down to make a call?

ML: No, no.

RA: Both hands on the wheel?

ML: Both hands on the wheel.

RA: Looking ahead at the situation down the road?

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[5] Richard Allums' claim note, 6/25/04:

> *...I tried the work phone again...tracked down iv driver outside... mike* ***denies he was reaching to grab a cell phone****. He had been thinking about making a call, but decided instead to proceed as he was near his destination...****He had moved as far right as he could in the event another vehicle was approaching****...he believes mhp officer measurements confirmed this and that possible cv was more to the center of the road...*

ML: Yes.

(D's Ex. 508.8). Lindberg explained during his deposition in the underlying liability case that he may have been confused when he mentioned his cell phone to the officer's at the accident scene:

> ***Q. And now your testimony is that it wasn't ringing?***
>
> *A. Afterwards I remembered when I got -- what I was going to do, what happened. I was going to call Don, but then I changed my mind and wasn't going to call him and see where he's at. And he was –*
>
> ***Q. But you're the only person on the face of the earth that came up with the idea that the cell phone was ringing before the accident; right?***
>
> *A. Yes...But you also got to remember, I just went through the accident too. (CR 128.3, pp. 72-73).*

During the bad faith trial Lindberg continued to deny Peterson's allegations of cell phone use:

> ***Q. Okay. Let me just get this straight. You deny to this day and throughout that you never told Officer Sons that your cell phone rang just as you were at the top of the hill and that you were distracted?***
>
> *A. Yes, I deny that.*
>
> ***Q. You deny that. And you deny that you told Deputy Fauque that the cell phone rang right at the top of the hill and it just --***
>
> *A. I do.*
>
> ***Q. And it distracted you, or you were reaching for it?***
>
> *A. Yes, I deny that. (TR4: 833).*

In addition to Lindberg's clear and unequivocal testimony, Allums also explained to the jury the contested facts surrounding Lindberg's alleged cell phone use:

> ***Q. Okay. So what you're telling this jury is that you think it's legal, perfectly fine for Mr. Allums -- or, I'm sorry, Mr. Allums, for Mr. Lindberg to take his eyes off the road and be inattentive to his driving responsibilities and be distracted from his driving responsibilities because his cell phone rings; is that right?***
>
> *A. I -- I'm sorry, I don't know where you're coming up with that. He told me that his eyes were straight down the road, and he told me that his cell phone was not ringing, and he wasn't reaching for it. (TR2:487-488).*

Gregoire also testified in the bad faith trial in regards to Lindberg's alleged cell phone use. He reiterated that Lindberg denied he was using his cell phone at the time of the accident and also testified that there was no cell service at the accident scene:

> ***Q. ...What did Mr. Lindberg convey to you about the cell phone use during this independent interview?***
>
> *A. I -- this is what we generally do, too. We generally, when we're doing a status report or evaluation report, we talk about the facts first, and then we talk about how they impact the case. In this case we talked about Mr. Lindberg. He advised that his cell phone did not ring, he had both hands on the steering wheel and he was looking straight ahead.*
>
> ***Q. ...Mr. Lindberg looks like he then told you about how he ...contacted a personnel at the scene, and could you just describe what Mr. Lindberg told you?***
>
> *A. Well, from there, what he did was he tried to use -- after the impact he tried to use his cell phone...he tried to use his cell phone and there*

was no reception in the area, so then he had to use ...he had a radio and he was able to use his radio to call for help. (TR4: 853-854).

Gregoire testified that the cell phone issue was moot if Peterson was driving on the wrong side of the road:

Q. Even if Denny Lee found that Mr. Lindberg was on his own side of the road, that wouldn't affect any negligence attributable to Mr. Lindberg because of his inattention due to the cell phone, correct?

A. Isn't what I'm trying to say there that the cell phone issue is irrelevant because if Mr. Peterson would have been on his side of the road, the accident wouldn't have happened and therefore the cell phone issue is moot? Is that what I'm trying to say there? (TR4:921-922).

The contested issue of Lindberg's alleged cell phone use was first brought to the trial court's attention on October 22, 2007. (CR 11, p. 5).

III. LINDBERG'S SPEED:

Another liability theory asserted by Peterson during the underlying claim was that Lindberg was driving too fast for the road conditions at the time of the accident. (TR1: 196). In contrast to Peterson's assertions however, St. Paul's investigation revealed that the posted speed on the road was seventy miles per hour. (TR2: 482). Lindberg told St. Paul that he was traveling at speed of around 40 to 55 miles per hour at the time of the accident. (D's Ex. 508.5; TR4: 857). The highway patrol officer believed Mr. Lindberg's speed was reasonable. (D's Ex. 540.3; 501.38; TR4: 910). Peterson's expert, C. Richard Anderson, conceded that Lindberg's speed was reasonable according to the investigating Montana

Highway Patrol officer. (TR2: 416). Likewise, Peterson's testimony during the bad faith trial was that Officer Sons had concluded Lindberg was not driving in a reckless manner. (TR4: 753).

Peterson's expert, Anderson, testified that that St. Paul's investigation of the Peterson/Lindberg accident would normally include a determination of whether or not either party was issued a traffic citation:

> ***Q. It's a fact, though, that St. Paul should have looked at?***
>
> *A. I agree that it's a factor, it's a factor that people look at. (TR2: 410)*

St. Paul's investigation determined that neither Lindberg nor Peterson was issued a citation for the accident.

The contested facts surrounding Lindberg's alleged speed were brought to the trial court's attention on October 22, 2007. St. Paul asked the Court to reconsider its denial of St. Paul's motions for summary judgment at the close of Peterson's case in chief. (TR4: 940).

SUMMARY ARGUMENT:

The jury, after reviewing all of the above factors, determined St. Paul did not violate Montana's UTPA because it had a reasonable factual basis for contesting Omimex's liability for the Peterson/Lindberg accident. This Court should uphold the jury's verdict. However, because the time, expense, and burden (to the jurors who served), could have been largely avoided should the trial court have granted

St. Paul's motions for summary judgment, asserting that Peterson's UTPA claims were barred pursuant to the Court's holding in *Giambra v. Travelers Indem. Co.* and pursuant to the statutory defenses afforded to St. Paul under MCA § 33-18-242(5), this Court should review the trial court's errors in denying St. Paul's motions for summary judgment and find as a matter of law that Lindberg's liability for the underlying accident was not reasonably clear because of the existence of genuine issues of material fact regarding Lindberg's alleged liability and negligence.

The Court should also take the opportunity to address the trial court's abuse of discretion in allowing Peterson's expert, C. Richard Anderson, to testify upon legal conclusions and in a manner inconsistent with the Court's prior holdings pertaining to improper expert testimony upon issues of law. See, *Safeco Ins. Co. v. Ellinghouse* (1986), 725 P.2d 217, 225 and *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, 65 P.3d 570, ¶ 28.

Finally, this Court should take the opportunity to address the inherent injustice permitted by the trial court when the judge wrongly allowed Peterson to repeatedly question and attack the credibility of Dr. Lee's opinions regarding causation of the underlying accident without permitting him the opportunity to testify in support of the credibility of his findings.

ARGUMENT:

I. ST. PAUL'S MOTIONS FOR SUMMARY JUDGMENT:

A. As a Matter of Law Lindberg's Liability was not Reasonably Clear:

Based upon the factors set forth above, the trial court erred when it denied St. Paul's motions for summary judgment. St. Paul had a complete defense to Peterson's UTPA claims where it had a legitimate basis in fact and/or law for contesting liability for his claim or the amount of the claim. *See, MCA § 33-18-242(5).* Contrary to Peterson's arguments, liability cannot be 'reasonably clear' where there exists a legitimate dispute pertaining to the issues of negligence and/or liability. See, *Giambra v. Travelers Indem. Co.,* 2003 MT 289, 78 P.3d 880, ¶¶ 14-16. The law set forth in *Giambra* is clear and uncomplicated. If there were contested liability issues concerning Lindberg's negligence, liability was not reasonably clear. Accordingly, *Giambra* operates as a complete legal defense to Peterson's UTPA claims. See, *Watters v. Guaranty Nat. Ins. Co.* 300 Mont. 91, 112, 3 P.3d 626, 639, ¶72. (Court holding that insurer's conduct under the UTPA must be weighed according to the available case law at the time insurer denied the claim).

B. Contested Factual Issues Required Summary Judgment in St. Paul's Favor:

This Court has long recognized that it is improper for the trial court to determine the issue of liability as a matter of law, where the facts surrounding the issue of liability are contested. See, *Hart-Anderson v. Hauck* (Mont. 1989), 239 Mont. 444, 447-448, 781 P.2d 1116, 1118; See, *Boyes v. Eddie*, 1998 MT 311, 970 P.2d 91, 93 – 94, ¶ 16[6]. *Hart-Anderson* involved a rear-end auto collision where the defendant and plaintiff were each asserting the other party's fault for causing the accident. During the jury trial, the plaintiff's assertions regarding the accident were corroborated by several eye witnesses. In contrast, the defendant's assertions were only supported by his own testimony. At the close of evidence, the plaintiff moved for a directed verdict on the issue of liability. The trial court granted the plaintiff's motion. On appeal, this Court reversed the trial court, holding that the defendant's contrary liability assertions (however slight) were sufficient to preclude the court from determining the liability issue as a matter of law:

> It is not appropriate for the court to weigh conflicting evidence; rather, that is the function of the trier of fact, in this case, the jury. As in *Reed,* it was possible for the jurors to find that plaintiff came to an abrupt stop in front of defendant and was contributorily negligent. We conclude that reasonable men might differ in drawing conclusions from the evidence. Thus a directed verdict in favor of plaintiff was not

[6] Court holding that "the purpose of summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials...however, **summary judgment should never be substituted for a trial if a material factual controversy exists**."

appropriate.

Hart-Anderson, 781 P.2d 1116, 1118.

The underlying Peterson liability case was not unlike the contested trial testimony discussed by this Court in *Hart-Anderson*. Given the disputed issues of fact in the underlying liability case, Peterson could not have obtained summary judgment in his favor on the liability issue. Pursuant to the Court's holding in *Hart-Anderson*, Lindberg's stated belief that Peterson caused the accident by driving down the middle of the road, together with Dr. Lee's accident reconstruction placing Mr. Peterson more than two feet over the midpoint of the road, would have effectively barred summary judgment from being granted in Peterson's favor.

The contested liability facts which would have precluded Peterson from achieving summary judgment and/or a directed verdict in the underlying liability case are the same facts which the trial court should have relied upon in granting St. Paul's motions for summary judgment on Peterson's UTPA claims pursuant to *Giambra* and MCA § 33-18-242(5). (See, CR 11, pp. 3-6; CR 29, pp. 1-4; CR 57, pp. 3-10). The trial court erred when it failed to recognize the existence of a legitimate factual dispute over Lindberg's liability for the underlying accident. Because reasonable minds could not differ as to the existence of a reasonable factual dispute over Mr. Lindberg's negligence and liability, the Court should have

determined Lindberg's liability for the underlying accident was not reasonably clear as a matter of law. See, *Lorang v. Fortis Ins. Co., 2008 MT 252*, 192 P.3d 186, ¶ 136.

II. EXPERT TESTIMONY OF C. RICHARD ANDERSON:

Even where this Court upholds the jury's verdict in St. Paul's favor, it should still take the opportunity to address the egregious abuse of discretion by the trial court in allowing Peterson's expert, C. Richard Anderson, to testify upon statements of the law (referred to by Peterson as Anderson's 'Revised Standards')[7]. In his response brief, Peterson does not even dispute that Anderson's testimony regarding his 'Revised Standards' was contrary to the clear Montana precedent precluding such testimony. See, *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, 65 P.3d 570, ¶ 28. Instead, Peterson wrongly asserts that Anderson's testimony was 'voluntarily elicited by St. Paul on cross examination.' (Appellant's Response Brf., p. 20). This assertion is false and misleading, as the record clearly shows that Peterson was absolutely relying upon Anderson's improper testimony as the cornerstone of his liability case:

> *MR. TOURTLOTTE: Your Honor, I would bet that if we let these in as standards that we're going to see similar proposed jury instructions adopting the language verbatim...*
>
> *THE COURT: Yeah, I think it gets to the point of being argument*

[7] Anderson's 'Revised Standards' are attached as Exhibit F to St. Paul's principal brief.

here... I agree, I don't think that the chart itself is appropriate, as far as instructing the jury in the opening statement on those particular points, so I'm going to sustain the objection.

MR. BLEWETT: All right, Your Honor. ***I would just point out that this is precisely what our expert is going to testify to,*** *which is the precise reason for an opening statement, to tell them what he's going to testify to. He's developed standards that are not legal, and* ***we will proceed with your ruling, but you just knocked out a vast amount of our case.*** *(TR1: 177).*

Peterson's response likewise ignores the numerous points in the record where St. Paul objected to Peterson's use of Anderson's 'Revised Standards' during the trial. (TR1: 175-177; TR2: 231-238). Over St. Paul's objections, Anderson improperly referred to his chart of 'Revised Standards' and improperly instructed the jury upon the law they would later be applying to the facts of the case:

Q. And have you developed a list of such standards that in your opinion should be followed in handling claims?

A. Yes. I -- I wouldn't say that I personally developed them. ***They're just -- they're standards that have been developed in cases like this. They've been utilized in Montana Federal District Court, in State District Court****...(TR2: 250).*

Anderson's improper testimony was a calculated attempt to instruct the jury upon how they should apply the law to the facts of the case. (TR2: 269-270). Anderson repeatedly referred to St. Paul's conduct as a 'violation' of his 'Revised Standards'. (TR2: 318-321).

Upon St. Paul's objection, the trial court acknowledged to the jury that Anderson's standards were essentially a regurgitation of the law they would later

be called upon to apply to the facts of the case. The trial court improperly allowed Anderson's testimony however and only cautioned the jury that "the law may be different than [his] standards":

> *However, I'm going to caution the jury, I'm going to, at the end of the case, give you the law that indicates whether or not -- you're going to have to apply to determine whether or not the defendant did conform with the law or not.* ***The law may be different than these standards. So you're going to get the final instruction****, which is going to tell you what the law is that you have to apply.* (TR2: 319).

The legal issues set forth in Anderson's 'Revised Standards' were in fact substantially similar to the law set forth in MCA § 33-18-201 and to the instructions which the trial court ultimately gave to the jury. (See, CR 131, Nos. 6, 7, and 8).

As previously argued in St. Paul's principal brief, expert opinion that states a legal conclusion or applies the law to the facts is highly prejudicial and inadmissible. *Perdue*, 65 P.3d 570, ¶ 28. Accordingly, all of Anderson's trial testimony regarding St. Paul's investigation and its handling of the underlying claim and the relationship of those facts to Anderson's 'Revised Standards' should have been deemed inadmissible by the trial court. See, *Perdue,* ¶ 28. Given the highly prejudicial nature of Anderson's testimony, this Court should take the opportunity to address the outrageousness of the trial court's abuse of discretion, even though St. Paul was able to overcome the extreme prejudice and obtain a verdict in its favor. See, *Hart-Anderson v. Hauck* (1988), 748 P.2d 937, 943.

III. TRIAL COURT'S REFUSAL TO ALLOW DR. LEE TO TESTIFY:

As previously argued, the trial court also erred when it refused to allow Dr. F. Denman Lee to testify as a fact witness during the trial. Dr. Lee's credibility and methodology was called into question several times by Peterson's counsel and expert witness during the course of the trial:

> ***Q. I mean, they were sharing this road, basically. As an attorney experienced in evaluating liability on these types of cases, what is your opinion, is the significance of the fact that Dr. Lee had four different versions of this center line issue?***
>
> *A. It really hurts his credibility, if the case were to be tried. I think the jury would have a tough time believing an expert that has four different findings. (TR2: 338-339).*

Given the attacks levied upon Dr. Lee's credibility, fairness required that he be afforded the opportunity to testify and explain his methods and opinions.

For example, Richard Allums specifically testified about a telephone conversation he had with Dr. Lee in the fall of 2004, where Lee indicated that he needed additional information in order to complete his analysis. Dr. Lee should have been permitted to testify about his conversations with Allums in order to explain to the jury why he needed additional information from the investigating officer's file in order to finalize his report. The Court's refusal to allow Dr. Lee to testify was prejudicial to St. Paul.

CONCLUSION RE: CROSS-APPELLANT ISSUES:

This Court should uphold the jury's verdict, finding that St. Paul did not violate the UTPA. Additionally, this Court should find liability for the Peterson/Lindberg accident was not reasonably clear as a matter of law. The Court should also find that the trial court abused its discretion by allowing Peterson's expert to testify upon conclusions of law and in refusing to allow Dr. Lee to testify as a fact witness.

DATED this 15 day of February, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced and the word count, is 3,981 words, excluding the Certificate of Service and this Certificate of Compliance.

DATED this 15 day of February, 2010.

BROWN LAW FIRM, P.C.

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CERTIFICATE OF SERVICE

This does certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows, this 15 day of February, 2010:

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